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LEONG SHIN HYUN

v.

REKAPACIFIC BHD & ORS

b

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING MOTION NO: R1-25-106-1998]
29 JANUARY 2001

c

LABOUR LAW: *Employment - Constructive dismissal - Repudiatory conduct, what amounts to - Series of acts or incidents - Whether secondment part of employment contract - Long period of suspension without charges - Whether Industrial Court erred in law*

d

The applicant ('the claimant') claimed that he had been constructively dismissed by the first respondent, Berjaya Industrial Bhd (now known as Rekapacific Bhd), and the second respondent, Berjaya Group Bhd. The application was for an order of *certiorari* to quash Industrial Court Award No. 434 of 1998.

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The claimant, an accountant, was in the service of the first and second respondents, having started his career as financial controller and ending as senior general manager. While the claimant was a senior general manager in Berjaya Air Sdn Bhd ('BASB'), he was suspended from duty on full pay and a domestic inquiry was held on the charges made against him. The charges however were not proved and the claimant was reinstated as senior general manager of BASB but was immediately transferred to Berjaya Roasters (M) Sdn Bhd ('BRSB').

*f**g*

Thereafter, the claimant was informed that he would be transferred to the first respondent. On the same day he received a letter from the first respondent informing him of the transfer with an intimation that he would be seconded to Oriental Garment Sdn Bhd ('OGSB') on the same date. The claimant wrote a letter to OGSB stating that he would comply with the order of secondment but that it was under protest and without prejudice to his contractual rights. The claimant also alleged that he was denied many perks in relation to his position and that since reporting to OGSB he had been given no work to do except to sit in his room. The claimant then tendered his resignation

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The issue for consideration was whether the Industrial Court had taken into account the whole chain of events including the claimant's suspension from work.

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Held:

- [1]** Repudiatory conduct may consist of a series of acts or incidents, some of them quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment that the employer will not, without reasonable and proper cause conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. **a**
- [2]** The Industrial Court had erred in law in not considering the facts pleaded by the claimant and the clear and conclusive evidence adduced in the case that the secondment was not part of the contract of employment and that the claimant had not consented but had in fact protested the secondment. **b**
- [2a]** Had the Industrial Court considered such issues, it would have found in effect that the second respondent was guilty of wrongful conduct which entitled the claimant to claim that his employer had evinced an intention no longer to be bound by the contract of employment, and that the claimant was entitled to treat himself as discharged from any further performance. On that ground alone the Industrial Court should have held that that was dismissal and that the dismissal was without just cause or excuse. **c**
- [3]** It was incumbent upon the Industrial Court to have made a finding as to why it took such a long time to investigate the allegations of misconduct against the claimant while he remained suspended for so long instead of merely stating that the suspension was *bona fide*. **d**
- [3a]** The claimant was not only suspended for an inordinately long period, but was suspended for unspecified charges for that period. Furthermore, the suspension was without specific charges. The charges were made known some five months after he was first suspended and was done as a matter of routine resulting in unnecessary harassment and humiliation to the claimant. **e**
- [3b]** Although the claimant was reinstated to his former position in BASB, on that very day he was transferred to BRSB and had to perform menial duties. This operated as a repudiatory breach of his employment and entitled him to treat himself as having been constructively dismissed, whether immediately or upon a series of repudiatory acts by the second respondent. **f**
- [Application allowed; case remitted to Industrial Court for appropriate remedy.]* **g**
- h**
- i**

a Case(s) referred to:

Lewis v. Motorworld Garages Ltd [1986] 1 CR 157 (foll)

Ng Beng Tuck v. Pan Global Textile Bhd Penang [1996] 4 CLJ 313 (refd)

For the applicant - P Kuppusamy (P Thavaselvei with him); M/s P Kuppusamy

For the 1st respondent - S Rutheran; M/s VK Lingam & Co

b *For the 2nd respondent - KH Ching; M/s VK Lingam & Co*

Reported by Mariette Peters-Goh

JUDGMENT**c KC Vohrah J:**

The applicant (the claimant in the Industrial Court) claimed that he had been constructively dismissed by the 1st respondent, Berjaya Industrial Berhad, now known as Rekapacific Berhad (the 1st company), and by the 2nd respondent, Berjaya Group Berhad (the 2nd company).

d The application before me is for an order of *certiorari* to quash Industrial Court Award No. 434 of 1998.

e The claimant, an accountant, was in the service of both the 1st and 2nd companies for 7 1/2 years having started his career in the 2nd company as Financial Controller of South Pacific Textile Industrial Bhd, a subsidiary of the 2nd company and apparently ending as Senior General Manager after a few days at Oriental Garment Sdn Bhd (OGSB).

f While the claimant was in Berjaya Air Sdn Bhd as Senior General Manager he was suspended from duty on full pay on 22 September 1995. A Domestic Inquiry was held against him on nine charges on 21 February 1996. The 2nd company found the charges not proved. He was re-instated to his position as Senior General Manager of Berjaya Air Sdn Bhd on 18 April 1996 and was immediately told to go to Berjaya Roasters (M) Sdn Bhd as Senior General Manager. At Berjaya Roasters he underwent training which included the washing of roaster ovens, the cleaning of chicken, the preparation of food and the serving of customers.

g On 1 August 1996 the claimant received a letter from Berjaya Roasters informing him that he was to be transferred to the 1st company with effect from 15 August 1996 and that the 1st company would be writing to him.

h On the same day he received a letter from the 1st company informing him of the transfer from 15 August 1996 with an intimation that he was "seconded" to Oriental Garment Sdn Bhd (OGSB) on the same date. The letter reads:

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BERJAYA

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BERJAYA INDUSTRIAL BERHAD

Mr. George Leong Shin Hyun

1st August 1996

Present

PRIVATE & CONFIDENTIAL

b

Dear Mr Leong,

1. TRANSFER FROM BERJAYA ROASTERS (M) SDN BHD

2. SECONDMENT TO ORIENTAL GARMENT SDN BHD

c

We refer to the letter dated 1 August 1996 from Berjaya Roasters (M) Sdn Bhd on your transfer to our Company.

We are pleased to confirm that you shall be transferred to and absorbed into the service of Berjaya Industrial Berhad with effect from 15 August 1996 as SENIOR GENERAL MANAGER (Oriental Garment Sdn Bhd), A1 Grade.

d

With effect from 15 August 1996, you shall be seconded to Oriental Garment Sdn Bhd as Senior General manager of the Company. As this is just a secondment, you shall remain an employee of Berjaya Industrial Berhad.

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In this position you shall report to and take instructions for your day-to-day duties from the Director/Group General manager of Oriental Garment Sdn Bhd, Mr Charles Yew or any other person(s) as designated by the Company.

Your service shall be deemed continuous from the date of your appointment with South Pacific Textile Industries Berhad on 10th April 1989.

f

All your other terms and conditions of service and benefits shall remain the same as made known to you during your employment with Berjaya Roasters (M) Sdn Bhd.

Kindly report to work in Oriental Garment Sdn Bhd's office at 1st Floor, Suite 1.01, Bangunan FOP 123-A, Anson Road, 10400 Penang at 9.00 am on 15 August 1996.

g

We extend to you our best wishes in your career.

Please acknowledge receipt by signing and returning the duplicate of this letter to us.

h

Yours faithfully,

BERJAYA INDUSTRIAL BERHAD

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a Sgd. xxx
KP TAN
Director

b The claimant wrote the letter on 7 August 1996 to OGSB, and asked for clarification on certain matters including the reason for and the duration of the “secondment”, the accommodation arrangements in Penang where OGSB was located (he was in Kuala Lumpur), the amount of outstation allowance he would be paid and he made his position clear that “(in) the meantime, pending clarification on the above, I shall be going on secondment to Oriental Garment Sdn Bhd on 15 August 1996 under protest and without prejudice to my contractual rights.”

c The 2nd company through Encik KP Tan replied to the claimant on 14 August 1996 and in regard to the query on the “secondment” had this to say:

d We are surprised that you doubt whether the Company can second you to OGSB. We would like you to recall in a letter dated 14 July 1994 issued by your then employer, Berjaya Group Berhad (“BGB”), you were informed that you were seconded to Berjaya Air Sdn Bhd (“BASB”). While employed by BGB, you were on secondment to BASB for the period 16 July 1994 to 18 April 1996. Prior to or during your secondment to BASB you did not raise any doubt on whether BGB can second you.

e The claimant then shot back a letter to the writer which reads:

f 12 Persiaran Desa Aman
Taman Desa Aman
Cheras
56100 Kuala Lumpur

17 August 1996 A.R. Registered

g Berjaya Group Berhad
Level 18 Shahzan Prudential Tower
30 Jalan Sultan Ismail
50250 Kuala Lumpur

Attention: Mr KP Tan

Dear Sir,

h “SECONDMENT” TO OREINTAL GARMENT SDN BHD, PENANG

i I refer to my letter of 7 August 1996 to Berjaya Industrial Berhad and their reply of 14 August 1996 received by me at Oriental Garment Sdn Bhd’s Office in Penang at around 9.30 am yesterday through Oriental Garment Sdn Bhd’s Personnel Officer, Ms EE Beh.

I also refer to the conversation with Mr Charles CH Yew, Director/Group General Manager of Oriental Garment Sdn Bhd yesterday morning at around 10.30 am when he notified me of the following:

a

1) SECRETARY

Since I had a secretary in my previous postings, I requested for a secretary but was told by Mr Charles Yew that only he has a secretary in Oriental Garment Sdn Bhd, and I cannot have one.

b

2) DRIVER

When I requested for a driver in accordance with my entitlement as a Grade A1 employee, Mr Charles Yew told me that he will have to check with Mr Soon Keen Tiong, General Manager, Berjaya Group Personnel and Administration on this matter and revert to me. Todate he has still not done so.

c

3) RESERVE PARKING SPACE

Since I had a reserved parking space in my previous postings, I requested for a reserved parking space but was told by Mr Charles Yew that there is no reserved parking space for me.

d

4) OFFICE ROOM

The room allocated to me for use as an office is only about 100 square feet, and since I had a bigger office room in my previous postings (about 200 square feet), I requested for a bigger office room but was told by Mr Charles Yew that no other room was available.

e

Since reporting for work to Oriental Garment Sdn Bhd here in Penang on 15 August 1996, I have been given no work to do except to sit in my room.

f

Under the circumstances and in the light of all that had transpired since 22 September 1995, it is **now** clear to me that the Company (Berjaya Group Berhad), by its actions, wants to drive me out of my employment.

Therefore I have no alternative but to consider myself dismissed by the Company with effect from today, 17 August 1996.

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Yours faithfully

Sgd: xxx

Leong Shin Hyun

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cc Mr Charles CH Yew
Director/Group General Manager
Oriental Garment Sdn Bhd
1st Floor Suite 1.01 Bangunan FOP

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- a** 123A Jalan Anson
10400 Penang (AR Registered)
- cc Berjaya Industrial Bhd
Level 18 Shazan Prudential Tower
30 Jalan Sultan Ismail
- b** 50250 Kuala Lumpur (AR Registered)

c The claimant in requesting this court for review of the award reminds the court that the claim for constructive dismissal emanates from a whole chain of events which were pleaded in their statement of case which chain of events the Industrial Court had failed to take into account and therefore had erred in law.

d In the statement of case, sub-paras 3.1 to 3.10, several facts are pleaded and sub-para 3.11 pleads that “(in) view of the cumulative impact of the circumstances aforementioned, by letter dated 17 August 1996, the claimant considered himself dismissed by the 2nd company and or the 1st company ...”

The claimant relies on the principle re-instated by Neill LJ in the Court of Appeal in *Lewis v. Motorworld Garages Ltd* [1986] 1 CR 157 at 167.

- e** ... it is now established that the repudiatory conduct may consist of a series of acts or incidents, some of them quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment that the employer will not, without reasonable and proper cause conduct himself in a manner calculated or likely to destroy or seriously damage the relationship
- f** of confidence and trust between employer and employee.

The claimant also relies on other cases, *inter alia*, *Ng Beng Tuck v. Pan Global Textile Bhd Penang* [1996] 4 CLJ 313 for a re-iteration of this principle in the local context.

g Before dealing with the chain of events I think, however, it is necessary to look at the second last link of the chain, the simultaneous transfer of the claimant from Berjaya Roasters to the 1st company and the secondment to OGSB. The facts are pleaded in sub-paras 3.8 and 3.9 in the statement of case:

h 3.8 About 3 1/2 months later, by letter of 1st August 1996 the Company again ‘transferred’ the Claimant to another subsidiary Berjaya Industrial Berhad (the Company) with effect from 15th August 1996 and at once ‘seconded’ the Claimant to Oriental Garment Sdn Bhd with effect from 15th August 1996.

i 3.9 By letter dated 7th August 1996 the Claimant sought clarification on this ‘transfer’ and ‘secondment’ ...

I have referred to these and other letters earlier and I had pointed out that the claimant had made clear pending clarification of certain matters that he was going “on secondment to OGSB on 15 August 1996 under protest and without prejudice to my contractual rights.”

The chairman of the Industrial Court did not deal with the issue of the claimant’s secondment to OGSB. There was no contractual provision for that in the claimant’s terms and conditions of employment and the claimant did not agree to the secondment as was indicated in his letter protesting the secondment. The company acted surprised that the claimant should have protested the secondment using the weak argument that he had previously been seconded to Berjaya Air Sdn Bhd from 16 July 1994 to 18 April 1996 and he had not raised any doubt on whether the 2nd company could transfer him. The fact that he had consented to such a secondment, in fact there were also other secondments earlier, does not give rise to the inference that there was such a right implied into the claimant’s of contract of employment. The claimant clearly protested his secondment to OGSB and the Industrial Court erred in law in not considering the facts pleaded by the claimant and the clear and conclusive evidence adduced in the case that the secondment was not part of the contract of employment and that the claimant had not consented and had in fact protested the secondment. If he had considered the issue of the secondment he would have found that in effect the 2nd company was guilty of wrongful conduct which entitled the claimant to claim that that his employer had evinced an intention no longer to be bound by the contract of employment and the claimant was entitled to treat himself as discharged from any further performance. On that ground alone the court should have held that there was dismissal and that the dismissal was without just cause or excuse. His failure to consider the issue is an error of law.

In the context of there being no right to second the claimant to OGSB then it seems to me the claimant’s complaints relating to the perks and privileges of office in OGSB not being accorded to him are not relevant. In fact if the consent of the claimant had been obtained for the secondment these matters which were really outside the contract of employment in respect of the secondment in the first place could have been negotiated. The Industrial Court considered the matters at great length but with respect it would not have been necessary to have so considered them if he had ruled that the secondment without the claimant’s consent amounted to dismissal without just cause or excuse.

I now move on to the other events which together with the matter of the secondment, the claimant argues, form the chain of events which forced him to leave.

- a* Paragraphs 3.1 to 3.6 of the statement of case deal with the claimant's long suspension from work. It is not disputed that the claimant was suspended from 22 September 1995 to 15 February 1996 for five months. The claimant argues that the long suspension he faced, although with full pay, for five months before charges were leveled at him and a domestic inquiry subsequently held
- b* (where he was cleared), was inordinately long and unreasonable and was one of the events in the chain of events which the 1st company adopted to force him out.

The chairman of the Industrial Court dealt with the suspension thus:

- c* On 22.9.1995, the Claimant was given notice of suspension from his employment because of the various acts of misconduct alleged to have been committed by the Claimant ... The Claimant was holding a Senior General Manager's position and was not a labourer and naturally the Company would not want to condone any acts alleged to have being committed by the Claimant considered to be grave and serious to protect the Company's interest. While
- d* pending investigation, the Claimant was put on suspension on full pay and the court saw nothing wrong in this as it was the prerogative of the Company to do so provided it was done *bona fide* which the Court considered there was nothing not done *bona fide* at all.

- e* It will be noticed that the chairman's view was that pending the investigation the claimant was put on suspension on full pay and that there was nothing wrong in this as it was the prerogative of the company to do so provided it was done *bona fide* and he found that there was nothing done that was not *bona fide*. But the point is, did the chairman take into account the long delay of five months before the charges of misconduct were brought to his notice?
- f* The chairman did not specifically deal with this obvious issue. Instead the chairman referred to investigations being held and vaguely touched on the time taken for the investigations and gave some obscure reasoning in relation to this:

- g* The Claimant was later issued (with) the notice of Domestic Inquiry ... which was held on 21.2.1996 ... The Claimant was on full pay while on suspension and the time taken for investigation ought not be taken as condonation and in breach of natural justice as the company wanted to be fully convinced before the Domestic Inquiry was held and it depended on the nature of the case.

- h* With respect it was incumbent upon the chairman to have made a finding as to why it took such a long time to investigate the allegations of misconduct against the claimant while he remained suspended for so long instead of merely stating the suspension was made *bona fide*. There were no specific charges when the claimant was suspended at first. His finding merely that the suspension was *bona fide* therefore is flawed. I have gone through the notes
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of the proceedings in the case. The companies' two witnesses, COW1 (Group Senior General Manager of OGSB) and COW2 (General Manager, Group Personnel and Administration, Berjaya Group)) did not at all touch on the reasons for the long period of suspension. It will be noted that not only was the claimant suspended was for an inordinately long period – he was suspended for unspecified charges for that period. In fact the suspension was without specific charges. The charges were made known some five months after he was first suspended and was done, it would appear, as a matter of routine resulting in unnecessary harassment and humiliation to the claimant. In any event the claimant was exonerated of all the charges at the end of the day.

The claimant was re-instated to his former position in Berjaya Air Sdn Bhd and on the same day 18 April 1996, he was transferred to Berjaya Roasters (M) Sdn Bhd. The claimant says that the 2nd company had in fact punished the claimant despite having exonerated him on all the charges preferred against him and the act of re-instating him was not *bona fide*. There was the further complaint that he was sent as a trainee to Berjaya Roasters to do menial work. The argument was the company's move in transferring him to Berjaya Roasters on the same day he was re-instated in Berjaya Air and made to do menial work operated as a repudiatory breach of his employment and entitled him to treat himself as having been constructively dismissed, whether immediately or upon a series of repudiatory acts by the 2nd company.

The chairman said that when the claimant reported back for work there was no loss to what he had enjoyed before as he was given the same job as Senior Manager Berjaya Air and there was no change in his "Term of Employment" which was "deemed to be a continuity of service." But it has to be noted that he was transferred the same very day to Berjaya Roasters. The re-instatement was an empty act of formalism. That was not considered specifically although the chairman did consider generally why he was transferred there thus – "... why he was transferred to Berjaya Roasters was due to the fact that several managers in the Berjaya Air had given evidence against him at the Domestic Inquiry and to avoid victimization the company transferred him to Berjaya Roasters. There was nothing wrong in doing this as the interest of the claimant must be balanced with that of the company to achieve industrial peace and also for the good of the claimant and the company as a whole."

Again I have looked at the evidence of COW1 and COW2, the only two witnesses of the companies in the Industrial Court, and clearly the whole passage is not borne out by any evidence; there was no evidence that several managers at Berjaya Air had given evidence against him at the Domestic Inquiry and that to avoid victimisation to these managers the company had transferred the claimant to Berjaya Roasters. The chairman had made a finding unsupported by evidence and that is wrong in law.

- a* At Berjaya Roasters the claimant, an accountant and a very senior man, it is not disputed, had to do menial work – he had to wash roaster ovens, clear chicken, prepare food and serve customers.

The chairman's finding was that on a balance of probability the claimant was happy when he became Senior General Manager, Berjaya Roasters:

- b* While in Berjaya Roasters he was put under training for a month as the job was new to him, had also made no protest to the training and was not asked to clean toilets as admitted by him. He even told the Court that:

- c* Actually I did not write to anybody in Company alleging that I was badly treated.

Therefore on a balance of probability he was happy where he was as Senior General Manager, Berjaya Roasters based in Kuala Lumpur.

- d* With respect this strange finding is not borne out by the facts – he being transferred summarily and he having, humiliatingly, to do menial work. Then again, it has to be remembered he was an accountant by profession and clearly the transfer to Berjaya Roasters involved a loss of status and relegation of duties. What in reality took place was not a transfer but a demotion and this was a fundamental breach of the claimant's contract of employment.

- e* Bearing in mind the suspension and the matters which were sources of harassment and humiliation to the claimant, the transfer to Berjaya Roasters being in fundamental breach of the claimant's contract of employment, the secondment without his consent being wrongful conduct of the employer entitling him to claim that the employer had evinced an intention no longer to be bound by the contract of employment and the award dismissing the claim in the statement of claim must be set aside. Clearly the claimant was dismissed without just cause and excuse. *Certiorari* will issue to quash the award dismissing the claim. The matter is remitted to the Industrial Court to determine the appropriate remedy. Costs to the claimant.

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